C. OS/DA

Measurement

Average Time to Answer [Σ[(Date and Time of Response from Incumbent LEC OS/DA database/operator)-(Date and Time of Call to Incumbent LEC OS/DA database/operator)]]/Total Number of Calls to Incumbent LEC OS/DA Database/Operator

Categories

Competing Carriers	Incumbent LECs
• All Competing Carrier Calls	• All Incumbent LEC Calls

Exclusions

• None

VI. INTERCONNECTION

A. Trunk Blockage Measurements

Measurements

1. Percent Blockage on Interconnection Trunks Final Interconnection Trunk Groups Blocked During Reporting Period/Total Number of Interconnection Trunk Groups **2. Percent Blockage on Common Trunks** Final Common Trunk Groups Blocked During Reporting Period/Total Number of Common Trunk Groups

Categories

Competing Carriers	Incumbent LECs
• Interconnection Trunks • Common Trunks	• Common Trunks

Exclusions

• None

B. Collocation Measurements

Measurements

1. Average Time to Respond to a Collocation Request [∑[(Request Response Date and Time) - (Request Submission Date and Time)]]/Count of Requests Submitted in Reporting Period **2. Average Time to Provide a Collocation Arrangement** [∑[(Date and Time Collocation Arrangement is Complete) - (Date and Time Order for Collocation Arrangement Submitted)]]/Total Number of Collocation Arrangements Completed During the Reporting Period **3. Percent of Due Dates Missed With Respect to the Provision of Collocation Arrangements** [Number of Orders Not Completed within ILEC Committed Due Date During Reporting Period/Total Number of Orders Scheduled for Completion in Reporting Period] x 100

Categories

Competing Carriers	Incumbent LECs
• Physical collocation • Virtual collocation	N/A

Exclusions

• Orders cancelled by competing carrier

APPENDIX B

1. The application of statistical analysis to performance measurement data may be useful in determining whether an incumbent LEC is meeting the statutory requirements with respect to its provision of OSS, interconnection, and OS/DA. Statistical analysis can help reveal the likelihood that reported differences in a LEC's performance toward its retail customers and competitive carriers are due to underlying differences in behavior rather than random chance. We seek comment on whether specifying a preferred statistical methodology would assist in evaluating an incumbent LEC's performance. We also seek comment on whether a uniform statistical methodology would assist in comparing the performance of incumbent LECs across regions. We note that designating specific statistical methods for evaluating an incumbent LEC's performance may limit the use of other analyses that might be more appropriate or that might generate more insight. We seek comment on this issue.

2. To the extent that the Commission recommends use of specific statistical methodologies for the evaluation of an incumbent LEC's performance, we seek comment on which statistical tests the Commission should recommend. As a general matter, we believe that simple statistical tests that are widely understood and generally accepted would most likely be perceived as fair and lead to the least disagreement concerning the interpretation of the statistical results. Consequently, we propose the use of conventional statistical techniques for determining whether there exist statistically significant differences between the incumbent LEC's performance when providing service to its own retail customers and its performance toward competing carriers.

3. As an initial matter, we seek comment on whether conventional statistical tests should be performed to determine whether observed differences in the means, that is, the averages, of various performance measurements between an incumbent LEC's own retail customers and competing carriers are likely to reflect actual differences in performance. The t-test is a generally accepted test for the equality of two means.[1] If, for instance, the incumbent LEC's average order completion interval was five days for service to its retail customers and 6.2 days for service to a competing carrier, a t-test would reveal whether it was likely that the difference between the two measured averages reflected a true difference in the experience of the two recipients of service, and would provide a measure of the likelihood that the observed difference in service did not occur by chance.[2] We seek comment on

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[1] A pooled-variance t-test is generally considered to be an appropriate test of the equality of two means, or averages, provided that the population variances are the same for the two samples. R. Ramanathan, *Introductory Econometrics with Applications* 56 (1992) (Ramanathan). If the variances are different, however, a separate-variance t-test is considered more appropriate. If an incumbent LEC is discriminating against the competing carrier, the incumbent LEC's discriminatory actions may introduce additional variance into the data for the competing carrier. This suggests that a separate-variance test should be used. Tests of the equality of variances can be performed to determine which form of t-test would be more appropriate.

[2] If, for instance, the hypothesis that the means are equal were rejected at the .05 level, that would mean that the probability was less than 5 percent, or one chance in twenty, that the incumbent LEC's performance was actually no worse toward competitive carriers than toward its own customers.

whether a one-tailed test would be appropriate for determining whether an incumbent LEC's performance in provisioning network elements and resold services to competing carriers was worse than its performance toward its own retail customers.[3] We request comment on the above analysis, and, in particular, on whether some version of the t-test would be appropriate for use when evaluating an incumbent LEC's performance. We also seek comment on which version of the t-test would be most appropriate.

4. We seek comment on whether other analyses of the incumbent LEC's performance measurements, in addition to a comparison of averages, may be useful or necessary. We recognize that variability of response times, for instance, may affect the competitiveness of a competing carrier, but may not be reflected in a comparison of average times from the performance measurements. For example, an incumbent LEC might complete 50 percent of its own orders in four days and the remaining 50 percent in six days. At the same time it might complete 50 percent of the competing carrier's orders in one day and the remaining 50 percent in nine days. The average order completion interval would be five days in both cases, but the competing carrier would face very long completion intervals in half of all cases, while the incumbent LEC would never have completion intervals more than one day above the average. The likelihood of long completion intervals, in turn, may affect the competing carrier's ability to offer service to its own customers. To test statistically for differences in variability of service to a LEC's customers, a test of the equality of variances might be used.[4] In addition, it might be desirable to apply a test that considers what percentage of the time completion intervals exceed a certain value. A test of the equality of the proportions of each sample that exceed a given value would capture both differences in variance and disproportionate numbers of large values in the competing carrier sample.[5] We request comment on whether these tests should be used in addition to tests of the equality of means.

5. The statistical techniques described above require a minimum sample size, approximately thirty observations, to be reliable. We seek comment on whether the performance data reported by incumbent LECs in the manner described in Section IV are likely to contain a sufficient number of observations for each measurement to allow use of the statistical techniques described above. To the extent that particular measures are likely to contain too few data points to permit use of these techniques, we seek comment on whether the tests can be adjusted adequately to deal with smaller samples, or whether the use of other methods, such as tests based on the Student-t distribution, or nonparametric techniques, might

[3] A one-tailed test is appropriate when the direction of the expected difference is known. In this case, observers are only interested in the case in which competing carriers receive worse service than the incumbents' retail customers, not that in which they receive better service.

[4] Ramanathan at 57.

[5] H. Costis, *Statistics for Business* 402 (1972).

be more appropriate.[6] Commenters should also indicate whether they believe that any other assumptions associated with the statistical methods described above might not be met by the performance measurement data, and what the appropriate statistical methodology would be in such instances.

6. In an *ex parte* submission AT&T proposed using three criteria to determine incumbent LEC compliance with nondiscrimination obligations.[7] The first of these is the maximum number of comparisons failing the statistical test for nondiscrimination. AT&T proposes that the conventionally accepted 95 percent confidence level be used as the threshold for acceptable performance on individual tests, and that performance would be considered nondiscriminatory if no more than 5 percent of comparisons failed to meet this standard. The second criterion is the maximum number of repeating measurements failing the test. AT&T proposes that the standard should be that no more than 0.25 percent of measurements should fail the test in two or more consecutive months. The third criterion is that no extreme differences occur between the results for the incumbent LEC and those for the competing carrier. A difference greater than three standard deviations would be considered an extreme difference.[8] BellSouth in another proceeding has argued that the appropriate standard for assessing whether the data demonstrate nondiscrimination is that monthly results for the competing carrier should lie within three standard deviations of the average of the incumbent LEC's monthly performance, and that the results for one of the entities should not be higher than those for the other for three consecutive months.[9]

7. We request comment on AT&T's and BellSouth's proposed approaches to the use of statistical tests in evaluating performance data. We note that the threshold value for repeated tests of the same measurement appears to be based on an assumption that the observations would be independent in the absence of discriminatory behavior. We seek comment on whether that is a reasonable assumption. We note that repeated failures may reflect some unsolved technical problem rather than deliberate discrimination. Nevertheless, repeated poor performance on one crucial measurement, whatever the cause, may have a greater effect on competing carriers than scattered failures. We note also that, even if statistically significant differences appear between results for the incumbent LEC and the competing carrier, these differences may be too small to have any practical competitive consequence and may not justify a legal conclusion that the incumbent LEC has discriminated

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[6] *See* J. Freund & F. Williams, *Elementary Business Statistics: The Modern Approach* 292-95 (1964).

[7] *See* AT&T, Performance Measurements - Implementation Considerations, Feb. 3, 1998 at 2-3.

[8] The standard deviation is a measure of the spread or dispersion of a distribution of data about the mean. The probability that a normally distributed random variable lies within three standard deviations in either direction from its mean is 99.74 percent. J. Kmenta, *Elements of Econometrics* 61, 88 (1971).

[9] Application by BellSouth for Provision of In-Region, InterLATA Services in Louisiana, Appendix A, Vol. 5, Tab 13, Affidavit of William N. Stacy at 12-13.

against the competing carrier.[10] We seek comment on whether threshold values of the absolute difference, or the percentage difference, in averages of performance measures should be used in addition to measures of statistical significance. We also seek comment on whether the tests of equality of variances or equality of proportions discussed above would be appropriate for use in conjunction with the tests proposed by AT&T and BellSouth.

8. We recognize that other, more complex forms of statistical analysis, including multivariate and time series analysis, boot strap methods, and the use of extreme value statistical theory and the collective risk model, are available and might more accurately detect the presence of discrimination than the simple tests we propose. We request comment on the desirability of using such techniques, and on whether additional data collection, beyond that contemplated in Part V.C, would be necessary to allow use of these techniques.

9. We also seek comment on whether the form in which an incumbent LEC makes the data available to other parties and to regulators, whether it be through an audit or along with the performance report, should be specified. Data should be presented in a form that permits easy and thorough statistical analysis. Continuous data, for example, might provide more information and permit more precise analysis than data reported in intervals. We seek comment on whether the data should be provided in a computer file, rather than on paper, to facilitate analysis by recipients.

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[10] The Wisconsin Public Utility Commission points out that small differences can be found to be statistically significant when sample sizes are large, and that additional steps needed to process orders of competing carriers may result in "expected and acceptable" differences in processing times. Comments of the Wisconsin Public Utility Commission at 4-5.

APPENDIX C
List of Commenters

1. Aliant Communications Co.
2. American Communications Services, Inc.
3. Ameritech Operating Companies
4. Association for Local Telecommunications Services
5. AT&T Corp.
6. ATX Telecommunications Services, Ltd.
7. Bell Atlantic and NYNEX
8. BellSouth Corporation
9. Competition Policy Institute
10. Competitive Telecommunications Association
11. Excel Communications, Inc.
12. General Communication, Inc.
13. General Services Administration
14. GST Telecom, Inc.
15. GTE Service Corporation
16. Hyperion Telecommunications, Inc.
17. Independent Telephone & Telecommunications Alliance
18. Kansas City Fibernet, Inc. and Focal Communications Corporation
19. KMC Telecom, Inc. and RCN Telecom Services, Inc.
20. LCI International Telecom Corp.
21. MCI Telecommunications Corporation
22. Midcom Communications, Inc.
23. National Association of Regulatory Utility Commissioners
24. National Telecommunications and Information Administration (NTIA)
25. Network Logic, LLC
26. Pacific Bell, Nevada Bell, and Southwestern Bell Telephone Company
27. People of the State of California and the Public Utilities Commission of the State of California
28. Pilgrim Telephone, Inc.
29. Southern New England Telephone Company
30. Sprint Corporation
31. Telco Communications Group, Inc.
32. Telecommunications Resellers Association
33. Teleport Communications Group Inc.
34. Time Warner Communications Holdings Inc.
35. United States Telephone Association
36. USN Communications, Inc.
37. US ONE Communications Corporation
38. U S WEST, Inc.
39. WinStar Communications, Inc.
40. Wisconsin Public Service Commission
41. WorldCom, Inc.

Separate Statement
of
Commissioner Susan Ness

Re: Performance Measurements and Reporting Requirements for Operational Support Systems, Interconnection, and Operator Services and Directory Assistance

I am pleased that the Commission is at long last responding to the requests from LCI, Comptel, and the National Association of Regulatory Utility Commissioners for a rulemaking on performance measures for operational support systems ("OSS") of incumbent local exchange carriers ("ILECs").

A primary objective of the Telecommunications Act of 1996 was to facilitate the emergence of competition for local communications services. The Act is designed to facilitate new entrants' use of different entry strategies, including resale, unbundled network elements, and facilities competition. Each of these strategies depends heavily on the computer systems, databases, and personnel of the ILECs. That's what "OSS" is all about.

Appropriate measurements and reporting requirements can be of considerable value in promoting successful access to OSS. This is an area where detail matters; significant disparities in any one of multiple areas of performance can seriously undermine the prospects for competition. For example, if a competitive local exchange carrier ("CLEC") can successfully order unbundled loops, ports, etc., but its new customers are less likely to be identified accurately in E911 databases, it is reasonable to expect that the CLEC may be impeded in its efforts to compete -- to say nothing of the untoward effects on the customers who do switch carriers. Or, if dial-tone service is cut over promptly from the ILEC to the CLEC, but interim number portability is commonly cut over at a different point in time, incoming calls will go astray, and again competition and consumers will suffer.

OSS measurements can capture these problems. They can assist ILECs in self-assessments, so that corrective actions can be taken before disputes arise. Alternatively, when disputes do arise, appropriate measurement data may make it easier to distinguish isolated incidents from recurrent problems.

I affirmatively support the notion of proposing guidelines or model rules instead of binding FCC rules, and I am grateful to Commissioner Powell for his leadership in advocating this approach. Guidelines express a spirit of partnership with the state commissions. This proceeding will establish a detailed record upon which the states and the FCC can proceed in

a cooperative fashion. OSS measurement guidelines should enable states to act rapidly, as now is the time when such measurements will prove to be most useful.

Measurement guidelines will enable the state commissions and the FCC to use a common framework to monitor what are, typically, regional rather than single-state systems and databases. Guidelines will also provide state commissions with the flexibility to address state-specific circumstances and needs.

It should be noted that we also have chosen at this time not to propose performance or technical standards. Carriers, in the first instance, and state commissions, in arbitrations or rulemakings, are free to establish minimum tolerance levels of performance as they see fit.

The approach we are taking today preserves this Commission's option to consider the need for national rules at a later time, if the record or experience evidences a need to do so. OSS performance, after all, is not just a matter of state interest. It relates to the *national* interest in promoting competition and, more particularly, to the ILECs' obligation, under *federal* law, to provide just, reasonable, and nondiscriminatory interconnection, unbundled network elements, and resale. But I am happy to undertake this task in a less prescriptive manner. I urge the state commissions to participate in this proceeding, separately or in combination, so that the resulting OSS measurement guidelines will be as useful as possible, and therefore likely to be widely adopted.

I also hope parties will suggest ways in which OSS performance data can be collected and evaluated on a comparative basis. In the absence of national rules for measurements and reporting, are there still means by which it will be possible to compare a carrier's performance in one state against its performance in another state? How about the performance of one carrier in one state against the performance of a different carrier in another state? Benchmarking can be a valuable way of identifying individual carriers' shortcomings. Would it make sense for OSS measurement reports to be filed with the FCC as well as with the state commissions? Or could another organization, such as NARUC, collect the data and benchmark OSS performance? I look forward to interested parties' comments on these issues.

SEPARATE STATEMENT OF COMMISSIONER MICHAEL K. POWELL

Re: *Performance Measurements and Reporting Requirements for Operations Support Systems, Interconnection, and Operator Services and Directory Assistance (CC Docket No. 98-56).*

I write separately to underscore my support for (1) affirmatively proposing that this *Notice* result in model rules regarding performance measurements and reporting procedures that states may voluntarily adopt and (2) creating a thorough record for the purpose of crafting a comprehensive set of these measurements and procedures.

Adoption of performance measurements and reporting procedures as optional model rules is consistent with my goal of promoting regulatory efficiency. It is clear that moving to model rules is the most expeditious means for deploying sorely needed guidance to the markets and the States. In particular, given the questions regarding our authority to regulate in this area raised by the Eighth Circuit's decision in *Iowa Utilities v. FCC,* 120 F.3d 753 (8th Cir. 1997), I believe the Commission would engender significant legal and political opposition if we attempted to impose binding national rules before the courts resolve those jurisdictional questions. At the same time, I believe it is critical that the Commission respond to states and carriers that have requested guidance regarding performance measurements well before the courts are likely to reach our jurisdiction. Guidance in this area that comes months or years late will be of little use in moving the analysis already begun by the carriers, the Justice Department and some forward-thinking States to the next level. Thus, by creating a thorough record with the intention of issuing model rules regarding performance measurements in the near term, we are more likely to achieve timely, well-reasoned results and pro-competitive outcomes than we would if we attempted to impose binding national rules at this time.

In addition, by empowering the States and eliminating the potential for conflict with existing State policies, I believe the model rule approach more appropriately recognizes and, indeed, celebrates the marriage between the States and the Commission in giving birth to the pro-competitive, deregulatory environment mandated by the Act. In so doing, we shed further the misperception that somehow States will not "do the right thing" in promoting competition unless we essentially force them to. While I believe that seeking comment in this area via another procedural vehicle (such as a Notice of Inquiry) would have been more consistent with the Commission's commitment to adopt optional, rather than binding, rules, I applaud that commitment and hope that it heralds an important advance in the tenor and tactics of the agency.

Likewise, I support the creation of performance measurements and reporting procedures because they are consistent with my views about how the Commission may promote competition most effectively. As the *Notice* itself points out, performance

monitoring reports should reduce the need for regulatory oversight by encouraging self-policing among carriers. Further, the information collected in these reports will hopefully afford regulators the courage to shift the focus of their activities from prospective, prophylactic regulation to vigorous enforcement, as in the antitrust law context.

Of course, performance measurements and reporting procedures that are unnecessarily detailed would impose undue burdens on incumbent local carriers without commensurate benefits for competition. Thus, I support the goal stated in the *Notice* of balancing these benefits and burdens, and I would endorse wholeheartedly the adoption of less detailed or burdensome measurements and reporting procedures than are proposed here if doing so would still promote competition and achieve the statutory requirement of nondiscrimination.

In closing, I wish to thank the able staff of the Common Carrier Bureau, as well as the industry, for their diligence over the last several months in contributing to the proposals and questions contained in the *Notice*. I firmly believe that, if we continue to work hard and to be mindful of some of the considerations identified here and in the *Notice* itself, we will ultimately enable the American consumer to reap substantial rewards in the form of deregulation and enhanced competition.

Separate Statement of Commissioner Gloria Tristani

Re: *Performance Measurements and Reporting Requirements for Operations Support Systems, Interconnection, and Operator Services and Directory Assistance, Notice of Proposed Rulemaking*

This Notice of Proposed Rulemaking asks whether the Commission should adopt non-binding model rules regarding performance measurements for incumbent LECs' back office systems. I support this item because I believe performance measurements are needed to enable state regulators and new entrants to evaluate whether incumbent LECs are fulfilling their duty under the Telecommunications Act of 1996 to treat their competitors in a non-discriminatory fashion.

Although this item proposes to adopt no federal rules, it is a very positive step in promoting local telephone competition. Competitors clearly need access to incumbent LECs' back office systems in order to have a fair chance to compete. If new competitors cannot be responsive to their existing and potential customers the same way as incumbents, competitors will be at a severe disadvantage. It is particularly important that a new competitor not be condemned for bad service that is actually due to inadequate access to the incumbent LEC's OSS. Publicity of a new competitor's poor service could permanently damage its ability to compete, and competitors should not be harmed in this way if the fault lies with the incumbent LEC, not the new competitor.

Performance measurements also promote competition by facilitating enforcement. Performance measurements will enable regulators to easily detect anticompetitive behavior. In the newly competitive local market, regulators will be called upon to arbitrate disputes between competing carriers. The availability of performance measurements will allow regulators to resolve complaints quickly. And the threat of effective enforcement is likely to encourage self-policing, the best regulation of all.

But to get there, we will need state commissions to put performance measurements in place. I know that state commissions share my commitment to promoting competition in the local telephone market, and I hope they share my belief that nondiscriminatory OSS access is essential to bringing about that competition. The National Association of Regulatory Utility Commissioners recently asked the FCC to give the states guidance on OSS performance measurements. This Notice responds to the states' request, and I am particularly pleased that this item proposes *non-binding model rules*. I believe this approach represents genuine progress in the way the FCC works with state commissions. The model rules we adopt in this docket should be of considerable assistance to states interested in adopting their own OSS performance measurement requirements.

Finally, I want to commend the staff of the FCC's Common Carrier Bureau staff for their outstanding and tireless effort to produce this Notice. Their hard work in understanding OSS technology has enabled us to propose model rules in a clear, understandable fashion. I look forward to working with the staff and my colleagues to produce model OSS guidelines in the near future.

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DISSENTING STATEMENT OF COMMISSIONER HAROLD FURCHTGOTT-ROTH

Re: *Performance Measurements and Reporting Requirements for Operations Support Systems, Interconnection, and Operator Services and Directory Assistance. CC Docket No. 98-56.*

I dissent from today's decision to initiate a Notice of Proposed Rulemaking into the type of performance measures and accompanying reporting requirements that should be used in evaluating an incumbent local exchange carrier's Operations Support System (OSS). I have serious reservations about the propriety of initiating this proceeding at this time, and I believe that the approach outlined here is far too regulatory.

I share my colleagues' concerns about competition and the possible effect of operation support systems on competition. I have confidence that current statutes, and Sections 251 and 252 of the Act in particular, are sufficient to address these concerns. I fear that this NPRM corrodes rather than reinforces the robust structure of the Act. This NPRM is written with the best of intentions, but I fear the consequences are large, bad, and unintended.

Free Markets Do Not Rely on Regulation

In the best of worlds, consumers--by selecting higher quality services at lower prices from among competing providers--decide which businesses may enter and survive in a market and which may not. In this best of worlds, decisions between business and consumers and between businesses and other businesses are based not on regulatory constructs but upon contracts. Individuals are free to choose terms and conditions of contracts to suit their needs. One of the many great advantages of contracts over regulation is that, with contracts, individuals can obtain the specific terms and conditions to meet their specific needs rather than rely on the few generally available offerings for terms and conditions under regulation.

For most of the past century, regulators rather than consumers, made choices both about who may enter a market and about the terms and conditions of commerce. And regulators practically always chose a single provider, no competition, and narrowly regulated terms and conditions. Even where competition and private contracts were viable, regulators often insisted on using regulation rather than contract to manage transactions in telecommunications markets.

Section 252 Can Address OSS Issues

The Telecommunications Act of 1996 changed the regulatory framework by removing statutory and regulatory barriers to entry. Throughout the Act are concepts of competition, deregulation, and a reliance on private contracts. Section 252, for example, establishes specific forms of contracts, interconnection agreements, as the basis for various forms of commerce between and among telecommunications carriers. These contracts were and are to be negotiated between private parties, with State mediation and arbitration available. Contracts negotiated under Section 252 are not entirely free from regulation, but neither are they so rigid in structure that they cannot include provisions of interest to the contract parties such as OSS.

I have seen no evidence with respect to OSS that the process of negotiating private contracts with State arbitration under Section 252 is not working. To the extent that OSS is of interest to a party, it can negotiate those terms in an interconnection agreement. To the extent a party cannot successfully negotiate terms and conditions for OSS privately, it can seek State arbitration.

Has this process broken down? Perhaps there are instances, but in each case it is the State, rather than the FCC, that would seem to have the logical jurisdiction to remedy those disputes under Section 252. Even the most casual of conversations with any State Commissioner reveals that OSS issues are closely monitored and addressed by the States. There seems little clear evidence that the Section 252 process has failed either generally or specifically for the purposes of OSS.

FCC jurisdiction is questionable

Even if, hypothetically, the Section 252 process has failed to address adequately OSS issues, the jurisdiction of the FCC to remedy those grievances is questionable at best. The majority proposes to institute this NPRM under Section 251. I have serious doubts regarding the timing of this initiative. It has been more than two years since the Telecommunications Act of 1996 passed and -- as the majority recognize -- several states have already commenced proceedings to develop performance measures. To the extent this guidance was requested, an earlier proceeding would have been more helpful and in compliance with the statutory time-frames.

The Commission is initiating this proceeding under Sections 251(c)(3) and (c)(4) of the Act. But the Commission's previous implementation of section 251 was successfully challenged in court. In light of the Eighth Circuit's decision in *Iowa Utilities v. FCC*,[1] I

[1] *Iowa Utilities v. FCC*, 120 F.2d 753 (8th Cir. 1997), *writ of mandamus issued sub nom. Iowa Utilities Bd. v. FCC*, No. 96-3321 (8th Cir. 1998), *petition for cert. granted* Nos. 97-826, 97-829, 97-830, 97-831, 97-1075, 97-1087, 97-1099, 97-1141 (U.S. Jan. 26, 1998).

have reservations about the Commission's general authority to adopt any rules or regulations regarding performance measures or standards for OSS, and to initiate this proceeding at this time.[2] Moreover, the Eighth Circuit held that section 251(d)(1) "operates primarily as a time constraint, directing the Commission to complete expeditiously its rulemaking regarding [ ] the areas in section 251." *Iowa Utilities v. FCC*, 120 F.3d at 794. Section 251(d)(1) instructs the Commission that "[w]ithin 6 months of the date of enactment" it "shall complete all action necessary to establish regulations to implement the requirements of this section [251]". 47 USC section 251(d)(1). It has been more than more than two years since the Telecommunications Act of 1996 passed. It is questionable whether we have the authority to proceed with this Rulemaking under Section 251 at this time.

Moreover, even if the Commission had acted within the Statutory time framework of Section 251, it is questionable whether the specific details of this NPRM, national measures, standards, terms, and conditions set by a federal commission, are necessary or consistent with the combined language of Sections 251 and 252. Reading between the lines, I might easily argue that the Commission has the authority to construct national rules for OSS; but other reasonable people might reasonably observe that the phrase "operations support system" is not found in the Act, much less any reference to Commission authority to impose national rules.

Finally, sections 251 and 252 frequently refer to one another. Section 252 establishes a framework for private negotiations with State mediation and arbitration available. Presumably, there is a direct means for States, through the arbitration process, to impose OSS measures, rules, and standards as they see fit. Consequently, OSS may not be an issue in search of statutory jurisdiction.

Even If the FCC Has Jurisdiction, this NPRM Is Excessively Regulatory

Even if the FCC had jurisdiction to make national rules for OSS, the approach taken in this NPRM hardly seems deregulatory. There are a total of 30 measures proposed, page upon regulatory page of measures. Is each one of these truly necessary? Do these endless pages of measures add glory or insult to the deregulatory structure of the Telecommunications Act of 1996? Surely the proposed list is a broad-ranging shopping list of possible ideas rather than a central core of measures.

Even if the list of measures were small and concise, their mere compilation begs the question: for what purpose will they be used? There are but two possible answers:

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[2] The Eighth Circuit expressly held that the Commission's authority to prescribe and enforce regulations to implement section 251 is confined to six areas; section 251(c)(3) is not one of those enumerated sections and it is not clear that any of the six would provide sufficient authority for these OSS measurements and reporting requirements.

standard-setting regulation and litigation. It is not clear which of the two answers would harm competition more, but it is clear that each will have corrosive effect.

Under the public interest standard, regulations should be economically efficient -- that is, the ultimate benefits of any Commission regulation should exceed its costs. These costs include the burdens associated with the requisite gathering and maintaining of accurate information, and any accompanying reporting requirements. In almost all circumstances, truly efficient regulation relies on relatively few and very simple measures. I am concerned by both the sheer number and the level of detail contained in the proposed performance measures.

This NPRM is tedious with detail. Is it really necessary to measure more than nine aspects of average response time for the pre-ordering phase alone? Do we really need to know the average reject notice interval, the average FOC notice interval, the average jeopardy notice interval, the percentage of orders in jeopardy, *and* the average completion notice interval for resale residential POTS, resale business POTS, resale specials, unbundled loops (with and without number portability), unbundled switching, unbundled local transport, combination of UNEs *and* interconnection trunks? And all this later information only satisfies one sub-category of the Ordering and Provisioning category. I fear that the proposed 12 page list of measurements and reporting requirements is too costly and far too long to be useful for efficient regulation.

I support the item's request that parties identify the difficulties in obtaining and collecting the information for a particular measurement, and whether such difficulties outweigh the benefits of reporting this information. I would go further, however, and encourage parties to comment on the sheer number of measurements, the extent to which these measures are redundant, and the level of detail proposed. In addition, I specifically ask that parties include the express costs associated with providing each portion of this information. I also encourage all parties to focus their comments on which measures would be most helpful if no more than a few were ultimately adopted in a Commission white paper. Such a focus might be particularly important in light of the fact that, under Section 251, these measures and reporting requirements would apply to all local exchange carriers -- both large and small.

What does the majority indicate about the necessity of these detailed rules? That they are necessary to replicate market forces: "In a competitive environment market forces will tend to ensure that wholesalers provide quality service to their buyers. Here, where competition is largely absent, performance measures and reporting requirements may increase incumbent LECs' incentive to comply with their statutory obligations." NPRM at 9. But any form of regulation -- no matter how detailed -- is an imperfect surrogate for full-fledged competition.

Even if NPRM Were not Excessively Regulatory, Threat of Litigation Will Stifle Competition

Given the questions regarding our authority to regulate in this area raised by the *Iowa Utilities v. FCC* decision, I believe the Commission will face significant legal and political opposition as we attempt to define and possibly to establish national OSS standards before the courts have resolved these jurisdictional questions.

The prospect of legal challenges alone would not be sufficient to dissuade me from a position that otherwise has merit, but the legal challenges in this particular instance will have a debilitating effect on the removal of barriers to entry in telecommunications markets. No one should be so naive as to believe that the national measures proposed in this NPRM will not be the subject of intense litigation. I cannot predict the outcome of that litigation, but I can and do fear the shadow that that litigation will cast over efforts of new entrants to enter telecommunications markets.

There are tens of thousands of local exchanges in the United States. For each of these local exchanges, each measure proposed today provides the basis for litigation for each interconnection agreement over any arbitrary period of review. The number of combinations is literally uncountable.

The measures proposed today provide endless fields for future litigation. Any economist or statistician in the world can approach a telecommunications carrier and its eager lawyers and propose to find a deficiency in the OSS measures (interpreted as standards) of a carrier to which it is interconnected. The likelihood of finding such a deficiency is practically 100 percent. In the unlikely event that all measures are satisfactory today, one only needs to wait until tomorrow or next week or the week after to find a deficiency.

I count among my friends many economists, statisticians, and lawyers. Each has enormous opportunities for employment today without the FCC substantially expanding those prospects through this NPRM.

Make no mistake: both the threat and the reality of litigation will stifle entry into all telecommunications markets. Intense and long-lasting litigation will surround this rulemaking. That litigation will cast a shadow over all past interconnection agreements, over interconnection agreements made between now and any final court resolution of the Commission's rulemaking, and over all Section 271 applications in the same time period.[3]

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[3] Although the Commission bases its authority to issue OSS performance measures on section 251 -- not section 271 -- of the Act, the adoption of such measures inevitably will affect proceedings under section 271 and, in my view, would be inconsistent with the statute's limitation on the Commission's authority to expand the checklist. *See* 47 U.S.C. § 271(d)(4).

Even the threat of such litigation could cause potential entrants in many markets to pause and wonder whether the increased uncertainty created by such potential litigation raises the cost of entry too much.

Moreover, agreement-specific litigation will surround each and every interconnection agreement that fall outside of the specific measures proposed in this NPRM; similar litigation will cloud those interconnection agreements that follow the proposed measures but which inevitably have specific measures that are deemed unsatisfactory.

All of these prospects may be good for economists, statisticians, and lawyers, but are they good for businesses and consumers?

In the end, under this NPRM, it will be courts rather than consumers or even regulators who will be the final arbiters of who may enter and survive in a telecommunications market, and who may not. I have complete confidence in the courts, but they should not be burdened with making day-to-day decisions about matters that the market through competition and contracts can handle flawlessly and costlessly.

An Informal Paper Would Be Preferable to an NPRM

To the extent that the Commission ultimately adopts a white paper that outlines purely voluntary standards, some but not all of my concerns would be allayed. While still too regulatory in approach, at least no State would be compelled to adopt all of the national performance measures and reporting requirements outlined here. Thus, to the extent that they were voluntary, states could follow as much or as little of these regulations as they see fit. Nor would the Commission be bound by these proposed measures or reporting requirements. Presumably, the risk of litigation with a white paper would be substantially reduced.

But if the goal of this proceeding is merely the adoption of model guidelines that States may choose to follow as they wish, then why has the Commission proceeded with an NPRM as opposed to a Notice of Inquiry? Because the Commission may use the experience and record in this proceeding to "adopt nationally, legally binding rules in this area." NPRM, at 13.

Measures that are mere suggestions, although not binding, might be helpful particularly to some states that have not initiated their own proceeding. These guidelines may also be helpful to both the CLECs and the ILECs as common measures to use in the negotiation and arbitration process. To the extent that we can provide such suggestions and guidance, I am supportive. As recent events regarding the free airtime issue demonstrate, however, the legal distinction between an NPRM and an NOI is meaningful both politically and legally. Indeed, the benefit of proceeding with an NOI, instead of an NPRM, would be that the Commission could not adopt binding performance measures and reporting requirements as a result of that process. I remain concerned, however, that in initiating this

NPRM we have expressly reserved the possibility of implementing national regulations; an action that may lead to further protracted legal challenges that will only overshadow subsequent Commission decisions.

Conclusion

For all of the above reasons, I cannot support this NPRM. I share my colleagues' commitment to competition and to the Act. I believe the Act has robust language that can accommodate a wide range of unforeseen circumstances without requiring the Commission to rush in to pass new rules at every moment. This NPRM is too regulatory. It is not necessary. It will lead to endless litigation. It will not help consumers. For OSS, I believe that we should let the Act, the States, and private parties resolve the issues without having the Commission leap in with a regulatory rulemaking.